

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROGER REDFORD)	
Claimant)	
VS.)	
)	Docket No. 192,613
ANR FREIGHT SYSTEM, INC.)	
Respondent)	
AND)	
)	
PLANET INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant and respondent both appeal from an Award on remand entered by Assistant Director David A. Shufelt on February 21, 1997. Both parties waived oral argument.

APPEARANCES

Claimant appeared by his attorney, Davy C. Walker of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, David M. Druten of Kansas City, Kansas.

ISSUES

This is the second time the Appeals Board has visited this claim. Administrative Law Judge Steven J. Howard issued his initial Award in this case on May 1, 1996, finding that claimant was not entitled to permanent partial disability benefits because claimant was not disabled for at least one week from earning full wages. The Administrative Law Judge held that since the injury did not cause claimant to be off work for one full week he was not, based on provisions of K.S.A. 44-501(c), entitled to recover for permanent disability. See

Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. ____ (1996).

Claimant in Boucher petitioned for review by the Kansas Supreme Court of the Court of Appeals decision and while that petition was pending the Kansas Legislature amended K.S.A. 44-501. In Senate Bill 649 the legislature eliminated language in K.S.A. 44-501(c) requiring that a claimant miss at least one week. The amendment to K.S.A. 44-501(c) also stated that it would apply to all claims for injury occurring prior to the effective date of the amendment “unless the claim has been fully adjudicated.” Senate Bill 649, Section 2. This amendment became effective while the application for review in Boucher was pending before the Kansas Supreme Court. On May 3, 1996, the petition for review was denied by the Supreme Court.

Before the Supreme Court denied Boucher’s petition for review, the Administrative Law Judge ruled the amendments to K.S.A. 44-501(c) were not applicable to this proceeding. The Administrative Law Judge so ruled even though this claim was not fully adjudicated at the time the amendment became effective. Kansas Supreme Court Rule 8.03 provides:

“The timely filing of a petition for review shall stay the issuance of the mandate of the Court of Appeals. Pending the determination of the Supreme Court on the petition for review, the opinion of the Court of Appeals is not binding on the parties, may not be cited as precedent, and is not binding on the district courts. If a petition for review is granted, the decision or opinion of the Court of Appeals has no force or effect, and the mandate shall not issue. If review is refused the decision of the Court of Appeals shall be final as of the date of refusal and the mandate of the Court of Appeals shall be issued by the clerk forthwith.”

Thus, the Court of Appeals decision in Boucher which the Administrative Law Judge cited and relied upon for purposes of denying an award of permanent partial disability was not a final decision at the time the Administrative Law Judge entered his award.

Claimant appealed the Administrative Law Judge’s Award and the Appeals Board reversed and remanded this case to the Administrative Law Judge with directions to decide the remaining issues. Those issues were decided by the Assistant Director on February 21, 1997, and this appeal followed.

Claimant now seeks Appeals Board review of the findings by the Assistant Director concerning the nature and extent of claimant’s disability. Respondent challenges the order by the Assistant Director on the grounds that the amendment cannot be applied retroactively and that retroactive application would be unconstitutional.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the decision by the Assistant Director should be affirmed.

First, the Appeals Board finds that at the time Senate Bill 649 became effective, this case had not been fully adjudicated. The statutory amendment became effective with its publication in the Kansas Register on April 4, 1996. The Supreme Court dismissed the petition for review of Boucher on May 3, 1996. Pursuant to Supreme Court Rule 8.03, the decision of the Court of Appeals in Boucher became final on May 3, 1993, which was after the effective date of the amendment. Therefore, this case was not fully adjudicated before the statutory amendment became effective.

Respondent argues that retroactive application of the amendment to K.S.A. 44-501(c) would be unconstitutional. In Osborn v. Electric Corporation of Kansas City, No. 76,068 (opinion filed April 25, 1997), the Kansas Court of Appeals agreed and found the retroactive application to be unconstitutional. The appellee in Osborn (claimant in the workers compensation proceeding) has filed a petition for review by the Kansas Supreme Court. The Supreme Court has not yet ruled on the petition for review and possibly will not for some time. While the petition for review is pending the decision by the Court of Appeals is stayed. Supreme Court Rule 8.03. The Court of Appeals decision in Osborn will become the law should the Supreme Court either deny the petition for review or affirm the decision. However, at this point there is no controlling appellate court decision. The Appeals Board has previously held that the Board, as an administrative agency, does not have authority to declare an act of the legislature to be unconstitutional. The Board must, therefore, either proceed with the decision under the current state of the law or wait indefinitely for a final determination by an appellate court on the constitutionality of the amendment. The Board has determined to proceed and to issue its decision under the current circumstances. The Board will not consider respondent's constitutional challenge. The amended statute will be applied as written. See Rey v. Monfort, Inc., Docket Nos. 180,492; 180,935; 183,718 (February 1997).

Turning our attention to the nature and extent of claimant's disability, it is noted that the Assistant Director awarded a three percent permanent partial general body disability. Claimant alleges it was error to limit the disability award to the injury to his rib cage area only. Claimant seeks additional compensation for the injury and alleged permanent disability to his left wrist, arm, and shoulder.

The Assistant Director determined that any injury to claimant's left upper extremity and shoulder was not the result of his work-related accident and was, therefore, not compensable as a part of this claim. The Award by the Assistant Director sets out his findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. They are found to be accurate and the Appeals Board adopts same as its own findings and conclusions. Claimant is entitled to an award of permanent partial general body disability compensation based upon a three percent impairment of function.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director David A. Shufelt dated February 21, 1997, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Davy C. Walker, Kansas City, KS
 David M. Druten, Kansas City, KS
 Steven J. Howard, Administrative Law Judge
 David A. Shufelt, Assistant Director
 Philip S. Harness, Director